

(2019) 09 CAL CK 0356

In the Calcutta High Court

Case No : C. Appeal From Order (FMA) No. 34, 35, 36 Of 2019, Tender Of Mand Appl (MAT) 1387, 1388, 1389 Of 2014, Writ Petitions (WP) No. 9603 (W) Of 2016

Amar Nath Mukherjee And Others

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 27-09-2019

Acts Referred:

Electricity (Supply) Act, 1948 — Section 15, 78, 79, 79(c)
Constitution Of India, 1950 — Article 118, 226

Citation : (2019) 09 CAL CK 0356

Hon'ble Judges : Sanjib Banerjee, J;Suvra Ghosh, J

Bench : Division Bench

Advocate : Biswaroop Bhattacharya, Reshmi Ghosh, L. K. Gupta, Arjun Ray Mukherjee, Saheli Mukherjee, Raj Kumar Gaurisaria, Ram Chandra Agarwal, Sumit Kr Panja, Sumit Ray, Abhratosh Majumda, Soumitra Mukherjee, Avra Majumder, Himadri Kr Bandopadhyay, Rama Haldar

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J

1. The fundamental grievance of the appellants, and of the petitioners in the writ petition which has been tagged with the three appeals, is that they have been wrongfully prevented from opting in favour of a pension scheme that confers more rewards than the previous regime under which they continue to be governed.

2. Since the appellants, who had also instituted writ petitions which were dismissed by a common judgment and order of April 25, 2014, and the petitioners in WP 9603(W) of 2016 seek similar reliefs as declined to the appellants, the appellants and the writ petitioners are collectively referred to as the writ petitioners herein or, simply, as the petitioners. The employer in question was, at the relevant time, the West Bengal State Electricity Board which has

since been reorganised and broken into two distinct companies by the names of the West Bengal State Electricity Distribution Company Limited and the West Bengal State Electricity Transmission Company Limited.

3. Of the four lots of writ petitioners, only those in WP No. 5570(W) of 2011, which has given rise to FMA 35 of 2019, continued as existing employees, whether of the distribution company or the transmission company, at the time of the institution of the petition. The three other lots of writ petitioners were all retired by the time they invoked the jurisdiction under Article 226 of the Constitution. Most of them had retired from the Board itself, while others may have retired from the distribution company or the transmission company upon the reorganisation of the erstwhile Board and the transfer of its employees to the successor companies.

4. With effect from May 4, 1985, the Board introduced the West Bengal State Electricity Board Employees' (Death-cum-Retirement Benefit) Regulations, 1985. Such regulations were approved by the State government with certain modifications by an order of March 20, 1985. By such DCRB regulations, a provision for a substantial monthly pension was introduced for the employees of the Board. The DCRB regulations were compulsorily applicable to those appointed in the service of the Board after the publication thereof; but the pension scheme envisaged thereunder was optional for the employees who were appointed prior to the publication of the DCRB regulations on May 4, 1985. All the writ petitioners involved in the four matters were appointed prior to May 4, 1985. The first clause of the DCRB regulations provided for the same to have come into effect on April 1, 1981. At the outset, three of the key clauses of the DCRB regulations need to be noticed:

"2A. These Regulations shall apply to

(a) all whole-time employees (both permanent and temporary) who were in service on 31st March, 1981 and have not opted out of these Regulations;

(b) all whole-time employees (both permanent and temporary) who were appointed on or after 1st April, 1981 but before the publication of these Regulations; and

(c) all whole-time employees appointed after the publication of these Regulations."

"5A. (i) Every employee who had retired on or after 1.4.81 and who is in service and is willing to come under these Regulations will have to exercise option, in writing, in the prescribed proforma as per Annexure-I within 6 months [extended from time to time and last extended upto 30.6.2002 - Circular No. 34/2001 dt. 14.12.2001] from the date of issue of notice by the West Bengal State Electricity Board (immediately after publication of these Regulations) and furnish his photograph at the time of option. Provided that in the case of an employee, who is on leave or on deputation or on foreign service or under suspension on the

date of issue of the notice in this regard, the said option shall be exercised not later than 6 months of the date of his return from such leave, deputation, foreign service or on resumption of duty after suspension as the case may be;

(ii) If the option is not exercised by an individual employee within the time limit referred to above it will be deemed that he has not opted for coming under the Death-Cum-Retirement Benefit Regulations, 1985.

(iii) An employee who was in service on the date of issuing the aforesaid notice, but could not exercise option within the prescribed time limit due to death shall be deemed to have opted for the Contributory Provident Fund;

(iv) The option once exercised will be final."

"5B. Any person appointed after the publication of these Regulations (04.05.1985) will come under these Regulations automatically and exercise of option in his case is not necessary."

5. Though clause 5A(i) of the DCRB regulations required the relevant employees who had retired on or after April 1, 1981 to exercise their option, in writing, in a prescribed proforma, to come under the DCRB regulations within six months from the date of issue of a notice thereunder by the Board, the right to exercise the option was extended subsequently by circulars dated April 22, 1991, December 4, 1993 and, finally, December 14, 2001. The writ petitioners claim that for want of adequate notice, they could not exercise the option for opting under the DCRB regulations and the three petitions which are the subject-matter of the three appeals were filed in the year 2011 and the subsequent writ petition in the year 2016 to challenge the denial by the Board or its successor companies of a further opportunity to the writ petitioners to opt under the DCRB regulations. Though it may not be of much significance, but by the time the first of the writ petitions came to be filed in 2011, even the DCRB regulations were discontinued and employees of the erstwhile Board and its two successor companies are now governed by a new pension scheme.

6. Two principal grounds have been canvassed by the appellant-petitioners in challenging the perceived illegal acts of the employer and the failure of the writ court to appreciate the same: that the December 14, 2001 notification or circular providing the final opportunity to exercise the option to come under the DCRB regulations was not published in the Official Gazette as mandated by Section 79(c) of the Electricity (Supply) Act, 1948; and, that undue benefits have been made available to those covered by the DCRB regulations and to the exclusion of the erstwhile employees of the Board who had not opted under the DCRB regulations. The petitioners in WP 9603(W) of 2016 have urged a third ground: that in terms of clause 2A(a) of the DCRB regulations, the pension scheme envisaged under the DCRB regulations was to govern "all whole-time employees ... who were in service on 31st March, 1981 and have not opted out of these Regulations ..."; and, neither such petitioners nor the appellant-petitioners had ever "opted out" of the DCRB regulations.

7. The petitioners first refer to the circular of December 14, 2001. Such circular indicated the subject thereof being "Reopening of the scope for exercise of option for Pension Scheme". The decision embodied in the circular is reflected at paragraph 2 thereof, that "it has been decided that those employees who had joined at Board's service between 1.3.71 and 3.5.85 shall be given an opportunity to exercise option for coming over to the WBSEB employees' (Death-cum-Retirement Benefit) Regulations, 1985." The time for submitting the option form was stipulated in the circular to be by the end of June, 2002. The circular was accompanied by a booklet containing a comparative analysis of the different benefits under the Board's pension scheme and the Employees' Pension Scheme, 1995. It may be noticed that the employees of the Board who had joined service prior to the publication of the DCRB regulations were governed by a scheme of contributory provident fund and gratuity and those who did not opt under the DCRB regulations were later automatically covered by the Employees Pension Scheme, 1995.

8. The essential difference between the previous regime and the DCRB regulations or even between the DCRB regulations and EPS 1995 was that employees governed by the previous regime or EPS 1995 would obtain a substantial amount at the time of retirement and continue to obtain a nominal amount by way of monthly pension, whereas the employees governed by the DCRB regulations would not get a huge package at the time of retirement but would continue to get substantial monthly amounts by way of pension. The petitioners perceive the scheme under the DCRB regulations to have turned out to be more rewarding.

9. The petitioners stress on the penultimate paragraph in the circular of December 14, 2001 and insist that neither has such mandate of the circular been complied with nor has the employer ensured that the then serving employees and retired employees, who had a right to exercise the option under the circular of December 14, 2001, had been appropriately informed thereof or their rights to further exercise their option though the previous opportunity in such regard was as far as back in 1993-94. Such penultimate paragraph of the circular provided as follows:

"All Controlling Officers may be directed that the Circular and the Booklet must be reached to all employees under their control in time, so that, the employees may get the opportunity for exercising option within the period stipulated in this Circular."

10. The petitioners refer to an order dated March 17, 2016 passed by the Director (HR) of the distribution company. Such order was passed in response to several representations by retired and in-service employees for allowing those who were eligible to exercise their option to be governed by the DCRB regulations in terms of the circular of December 14, 2001 but had not applied because of lack of knowledge of such circular or otherwise. The order of March 17, 2016 noticed the basic grievance in the representations was that the

concerned retired and in-service employees were not given due opportunity to switch over to the pension scheme under the DCRB regulations.

11. The concerned director of the distribution company observed in such order of March 17, 2016 that all the former employees who complained of the lack of adequate opportunity to opt under the pension scheme pursuant to the December 14, 2001 circular, had received their terminal benefits as per their entitlement, including gratuity and the full and final payment of the provident fund dues. The director noticed that all the employees who made the representation discharged managerial duties and occupied positions of high responsibility ranging from junior manager to additional chief engineer at the time of issuance of the December 14, 2001 circular. The director remarked that such persons could not be heard to say that they were unaware of the circular of December 14, 2001, particularly since about 9000 employees exercised their option to be governed by the pension scheme after the circular of December 14, 2001 was published. The director found that the contentions of some of the erstwhile employees that they were not aware of the scope of exercising the option afresh could not be accepted. The concerned director recorded that it was the convention of the Board "that all developments and matters relating to employees' benefits and retirement benefits ... are made known to the employees through general office orders and circulars." The order expressed the view that "there simply exists no reason to believe the issue of ignorance" and those who did not exercise the option "seemed to have chosen deliberately not to exercise their option thinking that the pre-existing scheme (i.e. CPF scheme) would be much more beneficial to them."

12. Before recording the rival submission and addressing the legal issues raised, it is necessary to notice the status of all the petitioners involved in the four matters. Only four of the petitioners - the appellant Nos. 6, 14, 22 and 23 in FMA 36 of 2019 - had retired at the time that the circular of December 14, 2001 was published. All the other erstwhile employees of the Board who are the petitioners herein were in service at the time when the circular of December 14, 2001 was published and even when the time to exercise the option thereunder ran out on June 30, 2002. Indeed, some of the petitioners held senior managerial or executive positions and were the controlling officers whose subordinates availed of the opportunity afforded by the circular of December 14, 2001 that permitted employees and retired employees to switch over to a pension scheme that was introduced with effect from April 1, 1981.

13. On the issue of whether the petitioners were adequately aware of the opportunity afforded by the circular of December 14, 2001, a distinction has to be made between the petitioners who were in service at the time and those who had retired by then. It is possible that the petitioners who had retired were no longer in touch with their former colleagues or with their erstwhile employer or may have moved out of State or settled elsewhere post-retirement and, as such, not in a position to be aware of the circular or any developments as to the

possibility of an opportunity to switch over to the pension plan. The other petitioners, those who were in service at the relevant time, cannot be seen to be on the same footing as the retired employees who may have lost connection with the employer. In such context, the State has appropriately referred to the pleadings to bring out the case made out on facts by the petitioners.

14. Since it is only in FMA 36 of 2019 that some in-service employees at the relevant time and other retired employees were clubbed together, it is necessary to see the case that was made out in the petition carried to this court. At paragraph 12 of the relevant writ petition (from which the appeal in FMA 36 of 2019 arises), it was asserted "that the circular dated 14.12.2001 and the booklet were not brought to the notice of the petitioners, resulting which, most of the petitioners were unaware of further chance of exercise of option ... as a result the petitioners did not have the opportunity of exercising option within the period stipulated in the circular." To this, the response of the distribution company in its affidavit was that the petition "did not disclose which of the petitioners were aware (of) and which of the petitioners were not aware (of the option to switch over to the pension plan under) the DCRB 1985 ... the allegations about non awareness of DCRB 1985 regulation and submission of option of that Scheme are totally concocted and after thought ...". Despite such response of the employer in its affidavit while dealing with the contents of paragraph 12 of the relevant writ petition, the affidavit-in-reply dealt with the statements in the relevant paragraph of the employer's affidavit by reiterating the statements made in paragraph 3 of the reply. The only relevant sub-paragraph of paragraph 3 of the reply appears to be sub-paragraph 3(o), where the petitioners claimed that the circulars of December 4, 1993 and December 14, 2001 "were not circulated properly and not brought to the knowledge of all the employees." Despite the challenge in the employer's affidavit, the relevant petitioners did not specify which of them may not have been aware of the circular of December 14, 2001 or the circumstances that would convince the court that they may not have been aware thereof.

15. The State has also pointed out that in the detailed representation made by three of the petitioners in FMA 36 of 2019, they did not indicate that they were unaware of the circular of December 14, 2001 and, as such, could not exercise the option in accordance therewith. On the contrary, such representation claimed that in the light of the previous extensions to exercise the option, it led them "to believe with firm conviction that the scope would be extended in future as well when they may at their convenience exercise option." It was implicit in such assertion that the authors of the said written representation of April 7, 2011 had consciously chosen not to opt under the DCRB regulations on the basis of the circular of December 14, 2001.

16. The petitioners first refer to the Electricity (Supply) Act, 1948 and Section 79(c) thereof. Section 79 confers the power to a State Electricity Board to make regulations by notification in the Official Gazette on matters pertaining, inter alia,

to the duties of officers and other employees of the Board, and their salaries, allowances and other conditions of service. The petitioners maintain that since the DCRB regulations were promulgated by the Board under the authority conferred to it by Section 79(c) of the Act of 1948, any extension of the time to exercise the option thereunder ought to be regarded as an amendment to the Regulations of 1985 and, as such, required to be published in the Official Gazette for the same to be effective. The petitioners contend that the circular of December 14, 2001 could not have been acted upon in the absence of it being published in the Official Gazette. In support of such contention, the petitioners refer to Article 118 of the Constitution and clause 11.7.5 from the Manual of Parliamentary Procedures that instructs that all amendments to statutory rules and regulations ought to be published in the Official Gazette.

17. The petitioners next rely on a judgment reported at (1987) 1 SCC 658 (B. K. Srinivasan v. State of Karnataka) for the recognition therein that when the parent statute prescribes the mode of publication or promulgation, such mode must be followed. That matter pertained to an outline development plan of the Bangalore city planning area under the relevant Town and Country Planning Act. The petitioners also rely on another judgment reported at (2010) 1 SCC 730 (Rajendra Agricultural University v. Ashok Kumar Prasad). The issue in that case was whether a statute made under the Bihar Agricultural University Act, 1987 providing for benefits to the teaching staff could be enforced in the absence of its publication in the Official Gazette. It was contended on behalf of the party seeking a benefit under the statute that the principle, that a subordinate legislation which was not published could not be enforced against any member of the public because of want of knowledge in the absence of publication, would not apply where a statute was made for the benefit of a specific and small class of persons and the beneficiaries thereunder sought the implementation of such statute. The Supreme Court repelled the contention with the observation that "once the law lays down that publication of a Statute in the Official Gazette is a part of the process of making a statute, the object of making such a provision for publication recedes into the background and becomes irrelevant, and on the other hand, fulfilment of the requirement to make public the Statute by publication in the Official Gazette becomes mandatory and binding."

18. In the same vein, a judgment reported at (2014) 10 SCC 673 (Gulf Goans Hotels Company Limited v. Union of India) is cited since the Supreme Court observed therein that administrative orders and circulars can only be binding when published as per the mode of publication provided therefor.

19. On the aspect of a circular pertaining to a pension scheme being required to be communicated to the retirees and made known to them, the petitioners rely on a judgment reported at (2014) 3 SCC 617 (Calcutta Port Trust v. Anadi Kumar Das). Paragraphs 23 and 24 of the report have been placed where the Supreme Court emphasised that though every case had to be decided keeping in view the pleadings and evidence produced by the parties, "whenever an employer

introduces the pension scheme or makes the same applicable to retired employees and gives them opportunity to exercise option, the circulars/instructions issued for that purpose should either be communicated to the retirees or made known to them by some reasonable mode." The Court went on to add that the mere display of such notice on the notice-board of the head office could not be treated as an intimation thereof to the retired employees.

20. The next ground urged on behalf of the petitioners is the apparent anomaly between clause 2A(a) of the DCRB regulations and clause 5A thereof. According to the petitioners, almost all of whom, if not all, were whole-time employees of the Board on March 31, 1981, by virtue of clause 2A(a) of the DCRB regulations, such regulations applied to them unless they opted out of the same. They emphasise on the wording of the relevant clause, particularly the expression "and have not opted out of these Regulations". The petitioners submit that the wording of the clause is such that all whole-time employees of the Board in service on March 31, 1981 would be covered by the DCRB regulations unless they expressly opted out. This act to "opt out", according to them, would have to be an overt act; in the sense that they would have to indicate in writing that they were exercising their choice of opting out of the DCRB regulations. In other words, the petitioners submit that till such time that the relevant employees exercised such choice to opt out of the DCRB regulations, they would be covered thereby.

21. The petitioners then refer to the opening lines in clause 5A(i) of the DCRB regulations and the opening limb of clause 5A(ii) thereof to suggest that the expression "will have to exercise option, in writing, in the prescribed proforma" in clause 5A(i) has to be read subject to the expression "and have not opted out of these Regulations" in clause 2A(a) thereof. Similarly, the petitioners submit, that what is implied by clause 5A(ii) is also subject to the same expression in clause 2A(a) of the DCRB regulations. The petitioners contend that the act of exercising the option to be covered by the DCRB regulations may apply to other employees; but it could not apply to those covered by clause 2A(a) thereof.

22. The ancillary argument of the petitioners on such aspect is that since clause 5A of the DCRB regulations militates against clause 2A(a) thereof, the earlier clause has to be accepted and the later clause disregarded in accordance with the consistent jurisprudential principle in such regard. In such context, the petitioners have carried a judgment reported at AIR 1959 SC 24 (Radha Sundar v. Mohd. Jahadur Rahim) for the enunciation of the law in such context at paragraph 13 of the report.

23. Finally, the writ petitioners assert, that even if it be assumed for argument's sake, that they were aware of the circular of December 14, 2001 and consciously chose not to opt for the DCRB regulations in accordance with such circular, they were not aware at that time that additional benefits would be conferred on persons covered by the DCRB regulations and to the exclusion of persons covered by the contributory provident fund scheme that later became the EPS of

1995. The challenge is on the ground of discrimination. The petitioners submit that neither the circular nor the booklet circulated therewith gave any hint of what was to come in future by way of largesse to persons covered by the DCRB regulations and to the exclusion of the retired employees not covered thereby. They refer to several instances of benefits extended exclusively to the retired employees covered by the DCRB regulations. Such perceived benefits include the extension of family pension to divorced and widowed daughters beyond 25 years of age as done by a circular of December 12, 2006; the extension of family pension to unmarried daughters till their marriage as done by a circular of January 12, 2011; the amendment to clause 11(e) of the DCRB regulations made by a circular dated April 17, 2008 by which additional financial benefits were granted; and, the enhancement of the maximum limit of gratuity from Rs.3.5 lakh to Rs.10 lakh as brought about by a circular of July 21, 2010. The petitioners maintain that if they had known before June 30, 2002 - the last date for exercising the option in terms of the circular dated December 14, 2001 - that persons covered by the DCRB regulations would be conferred additional benefits at a future date to the exclusion of the other retired employees, they would certainly have opted to be governed by the DCRB regulations; and the very fact that additional benefits were afforded to retired employees governed by the DCRB regulations to the exclusion of the retired employees who were not governed thereby, made the whole process discriminatory and downright illegal.

24. The State takes up cudgels on behalf of the erstwhile Board and the Board's two successor companies, particularly since the State approved the DCRB regulations and modifications were incorporated in the draft DCRB regulations at the State's behest. The State also refers to its notification of July 4, 2007 by which the Governor accorded approval to the DCRB regulations. Such notification was published in the Kolkata Gazette on August 3, 2007 along with another notification of July 4, 2007 by which the State permitted the distribution company to raise a superannuation fund from its own resources as well as from the WBSEB Employees' Contributory Provident Fund for payment of pension and family pension to the beneficiaries directly from the fund without purchase of annuity from any insurance company as stipulated in Part-B of the Fourth Schedule to the Income-tax Act, 1961.

25. The State contends that it is completely unacceptable that any of the petitioners, particularly those who were in service at the time the circular of December 14, 2001 was issued, was not aware of the window that was afforded to further exercise the option to switch over from the CPF scheme or the EPS 1995 to the DCRB regulations. The State points out that no individual case of any possible prejudice suffered by any of the petitioners on any special grounds has been cited and the court ought to proceed on the basis that the petitioners were all aware of the opportunity afforded by the December 14, 2001 circular, but they still chose not to switch over to the pension scheme governed by the DCRB regulations.

26. The State next asserts that the technical objection taken under Section 79(c) of the Act of 1948 as to the non-publication of the circular of December 14, 2001 in the Official Gazette is an afterthought. The State submits that even if it be assumed that the relevant circular was not published in the Official Gazette, it would only imply that the circular may lose statutory force but it would continue to be an effective administrative order that would bind and govern all concerned. According to the State, the argument of non-publication of the relevant circular in accordance with Section 79(c) of the Act of 1948 may be irrelevant since even the original DCRB regulations, at the time of introduction, may not have been published in the Official Gazette. The State submits that the August 3, 2007 publication amounted to the publication of the entirety of the DCRB regulations as such regulations stood at that time, including all the extensions to exercise option permitted after the initial time therefor expired.

27. The State refers to Section 15 of the Act of 1948 that pertains to the Board's authority for appointing employees to enable the Board to carry out its functions under the Act. The State also refers to Section 78 of the Act of 1948 to bring out the contrast in the requirement of publication in the Official Gazette thereunder and the comparable requirement in Section 79 of the Act. While Section 78 gives the State government due authority to make rules to give effect to the provisions of the Act after previous publication by notification in the Official Gazette, Section 79 permits the Board to make regulations by notification in the Official Gazette and does not use the word "after" as is used in Section 78. The submission is that in respect of matters covered by Section 78 of the Act, the prior publication in the Official Gazette is mandatory; whereas prior publication may not be mandatory in respect of matters covered by Section 79 of the Act.

28. The State first cites a judgment reported at (2001) 6 SCC 446 (Meghalaya State Electricity Board v. Jagadindra Arjun) for the proposition that Section 79(c) is an enabling provision and even in its absence a State Electricity Board "can lay down service conditions by administrative order/instructions." Paragraph 11 of the judgment is instructive and the State submits that the legal position is that the conditions of service introduced without being notified in the Official Gazette would be that such conditions of service may not acquire statutory force, but it can never be said that such service conditions would not be binding on the employer or the employees. A judgment reported at (2008) 7 SCC 245 (Punjab State Electricity Board v. Gurmail Singh) is next brought by the State since it followed the principle in Jagadindra Arjun.

29. The State next refers to a judgment reported at (2015) 12 SCC 51 (Rajasthan Rajya Vidyut Vitran Nigam Limited v. Dwarka Prasad Koolwal) where a similar grievance as in the present case was carried to the court on the ground that further opportunities ought to have been afforded for the switch-over from the erstwhile scheme to the new pension rules. The State says that the observation at paragraph 37 of the report may be apposite in the present context:

"37. All that we can infer from the conduct of the respondents is that they went along with the CPF Scheme so long as it was beneficial to them, but when the calculation of pension, family pension and commutation of pension underwent an alteration pursuant to the order dated 23-8-1997 the respondents had a change of heart and sought to take advantage of the revised manner of computation provided for in the Rajasthan Civil Services (Pension) Rules, 1996. We can only say that the argument of a lack of awareness of the switch-over option appears to be nothing but a self-serving argument."

However, the petitioners herein point out that it is not evident from the judgment as to whether the notification for extension was published in the Official Gazette and the judgment does not refer to Section 79(c) of the Act of 1948 or the mandatory requirement of publishing regulations pertaining thereto in the Official Gazette.

30. The State relies on a judgment reported at (2011) 11 SCC 702 (Pepsu Road Transport Corporation v. Mangal Singh) for the proposition that regulations providing for grant of pensionary benefits will govern the rights and obligations thereunder of both the employer and the employee even if such regulations are non-statutory. The judgment is also informative as to the working of the CPF scheme and brings out the essential distinction between the CPF scheme that was in vogue in 1985 when the DCRB regulations came into effect and any pension scheme. The following extracts from paragraph 35 of the report are relevant:

"35. ... CPF was introduced with the object of providing social security to the employees working in factories and other establishments, after their retirement. CPF was instituted as a Compulsory Contributory Provident Fund by the enactment of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as "the Provident Fund Act").

... This CPF Scheme requires opening of the account for the employee by the employer. The Government/employer is under the continuous obligation to deposit equal or matching contribution made by the employee in his account till he retires. Once the employee is retired, then his rights qua Government's/ employer's contribution into his CPF account finally crystallises. After retirement, this entire CPF amount is paid to the employee as a retiral benefit. On the receipt of CPF amount, the relationship between employee and employer ceases to exist without leaving any further legal right or obligation qua each other."

31. Apropos the contention of the petitioners that they had been unfairly discriminated against, the State submits that such allegation is untenable and it may not lie in the mouth of the petitioners to urge such ground. Among the later benefits conferred on the pensioners covered by the DCRB regulations as cited by the petitioners, are the extension of the family pension to the divorced and widowed daughters beyond 25 years of age as done by a circular of December 12, 2006 and the extension of family pension to unmarried daughters till their

marriage as introduced by a circular of January 12, 2011. The petitioners have also referred to, inter alia, the enhancement of the maximum limit of gratuity from Rs.3.5 lakh to Rs.10 lakh by a circular of July 21, 2010.

32. The State's response on such count is that the original CPF scheme envisaged a complete severance of the relationship between the employer and an employee upon the employee obtaining a lump sum amount at the time of retirement. The State says that even though the CPF scheme came to be replaced by EPS 1995, only nominal monthly amounts were payable under EPS 1995. It is the further submission of the State that corresponding benefits could not have been offered to the those covered by the CPF scheme to whom EPS 1995 applied simply because it was only the employees governed by the DCRB regulations who left a substantial amount that was due to them with the employer or in any fund created by the employer and that the additional benefits that were extended to such persons could not be expected to be obtained by those who did not switch over to the DCRB regulations.

33. The State refers to a Constitution Bench judgment reported at (1990) 4 SCC 207 (Krishena Kumar v. Union of India). The State places paragraphs 32 and

34 from the report to emphasise on the rights of the employees governed under the CPF scheme as recognised in the judgment. It may be profitable to notice a passage from paragraph 32 of the report where the discussion revolved around the ratio decidendi in the famous Constitution Bench judgment reported at (1983) 1 SCC 305 (D. S. Nakara v. Union of India):

"32. ... the government's obligation towards an employee under CPF Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the Pension Scheme the government's obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government's legal obligation under the Provident Fund account ends while under the Pension Scheme it begins.

... It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. ... The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected ipso facto. It cannot, therefore, be said that it was the ratio decidendi in Nakara that the State's obligation towards its PF retirees must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could not form the basis for any classification for the purpose of this case."

34. The State points out that it would be evident from clauses 4 and 9 of the circular of December 14, 2001 that though the opportunity to exercise the option was reopened for those employees of the Board who joined the service between March 1, 1971 and May 3, 1985, including the retired employees and legal heirs of deceased employees, it was expressly indicated that the opportunity to exercise the option "shall not be available to ... the employees whose provident fund final payment claims have already been settled before the issue of this order ...". The State maintains that there was sufficient justification for making the distinction since those employees who had obtained the final provident fund payments had irreversibly severed their relationship with the Board and its successor companies.

35. A judgment reported at (2010) 2 SCC 59 (Union of India v. M. K. Sarkar) is placed by the State for such judgment reading the Constitution Bench judgment in Krishena Kumar to imply that "provident fund retirees who failed to exercise option within the time were not entitled to be included in the pension scheme on any ground of parity." More interestingly, however, paragraphs 11 and 12 of the report recount the history of the provident fund and the pension schemes and the then prevalent psyche of an employee when choosing one over the other. The judgment narrates that between 1957, when the pension scheme was first introduced, and 1976, when the respondent in that case retired, the benefits under the provident fund scheme and the pension scheme were more or less equal; and there was a general impression among employees that having regard to average life expectancy and avenues for investment of the lump sum PF amount, it was prudent to receive a large PF amount on retirement rather than receive a small pension for a few years. In those days there was also a ceiling on the pension and dearness allowance was also not included in the pay for computing pension. The Supreme Court also noticed that from 1980 onwards, the pension scheme became more and more attractive as compared to the provident fund scheme. There were several reasons therefor, including dearness allowance being included in the pay for computing pension, the ceiling on pension being removed and the liberalisation of family pension. Once the essential working of the two schemes is understood, it becomes obvious that all the petitioners herein regarded the bird in hand to be worth more than the several in the bush: they consciously chose to receive a lump sum amount with which they could create a corpus rather than risk the policy vagaries and market vicissitudes that governed the quantum of future monthly pension.

36. On the aspect of discrimination, three further precedents have been brought by the State: first, a Constitution Bench judgment reported at (1972) 1 SCC 421 (Dantuluri Ram Raju v. State of Andhra Pradesh) and then, the judgments reported at (1980) 3 SCC 125 (Union of India v. E. S. Soundara Rajan) and (2001) 1 SCC 442 (K. R. Lakshman v. Karnataka Electricity Board). The Constitution Bench observed that "if there is equality and uniformity within each group, the law will not be condemned as discriminative though due to some fortuitous circumstances arising out of a peculiar situation, some included in a

class get an advantage over others so long as they are not singled out for special treatment." The same sentiment is echoed in the two other judgments.

37. On behalf of the two successor companies of the erstwhile Board, the submission made on behalf of the State has been adopted. In addition, it is pointed out that since the CPF scheme or the EPS 1995 scheme was completely controlled by the Central government save the employer's contribution thereunder, the Board or its successor companies could not have conferred any equivalent benefit to those governed by the CPF scheme or EPS 1995.

38. There appears to be little doubt that all the petitions have emanated upon it belatedly dawning on the petitioners that they may have backed the wrong horse. The underlying appeal in all the petitions is that the petitioners may not have appropriately assessed the substantial benefits that would be available under the pension scheme introduced by the DCRB regulations. But to allow the petitioners the right to exercise an option some 30 years after the pension scheme came into force would be akin to allowing a person to buy a lottery ticket at face value when it had already won the jackpot. The three writ petitions which are the subject-matter of the appeals were instituted in 2011 and the fourth writ petition which has been directly heard by this Bench was brought in the year 2016. The DCRB regulations were born in 1985 and retrospective effect was given thereto from 1981.

39. As noticed earlier, it is just not believable that any one of the several petitioners who are before the court may not have been aware of the circular of December 14, 2001. To be fair to the petitioners, they have not been coy, and the arguments have been on the basis that the petitioners may have been aware of such circular but chose not to exercise the option thereunder. Of course, the petitions contain a line that in view of the several previous opportunities afforded to exercise the option, the petitioners expected a future window to be opened up and are aggrieved by no further opportunity in such regard being afforded after the expiry of the right to exercise the option under the December 14, 2001 circular. It must be said in such context that the petitioners had no legal right to demand any further opportunity nor could they have harboured any legitimate expectation in such regard. Equally, neither the original employer nor its successor companies were under any legal duty or even a moral obligation to provide another opportunity to exercise the option. After all, the December 14, 2001 circular was issued more than 15 years after the pension scheme under the DCRB regulations had been introduced and, effectively, more than 20 years after the DCRB regulations took effect retrospectively from 1981. Indeed, even if the December 14, 2001 circular had not been published and the opportunity provided thereby had not been afforded, no employee or former employee of the Board could have walked into a writ court to seek or obtain a mandamus for such purpose.

40. Without meaning any disrespect, the sophisticated argument fashioned around Section 79(c) of the Act of 1948 is born out of the desperation of the

petitioners in not having switched over to the pension scheme. Despite it being apparent that the DCRB regulations may not have been published in the Official Gazette in 1985 or even thereafter, the validity of such pension scheme has not been challenged, though the failure to publish the December 14, 2001 circular has been questioned on the same ground. The petitioners accept that the de facto doctrine may permit the court to ignore the aberration that was the non-publication of the DCRB regulations in the Official Gazette, but argue that the same benefit cannot be extended to the circular of December 14, 2001 since it amounted to the amendment of statutory regulations and, thus, mandatorily required to comply with Section 79(c) in all aspects, including the publication thereof in the Official Gazette.

41. It may not be necessary to search for a more wholesome answer to the legal issue raised regarding non-publication and the analogy drawn with an amendment to a statute that cannot have any effect unless published in the Official Gazette. Even though statutory regulations and statutes - and, as a corollary, the amendments thereto - cannot be placed on the same pedestal, the principle that when a statute requires a thing to be done in a particular manner it must be done thus or not at all, cannot be toyed with. In an appropriate case it may be necessary to assess whether the non-publication in the Official Gazette of regulations that are conferred statutory status would vitiate them altogether. Since the petitioners accept that the de facto doctrine can be an exception to the principle, at least in respect of statutory regulations, it may be seen that both the circular of December 14, 2001 and the parent regulations under which it was published may only be regarded as administrative orders. The several authorities noticed earlier instruct so and the binding force of the regulations and the circular do not lose any effective sheen even if downgraded from the statutory to the administrative.

42. Though much has been made of the second limb of argument that clause 2A of the DCRB regulations militates against a part of clause 5A thereof, it must be recognised that when a particular clause of a document is perceived to contradict another clause thereof, the first duty in interpreting the document is to attempt to harmonise the same. It is only upon the last strain of such effort yielding no fruitful result, would the court choose the former over the latter, or vice versa, depending on the nature of the document.

43. Clause 2A(a) of the DCRB regulations undoubtedly implies that the relevant employees would be covered by the DCRB regulations unless they opted out. Read in isolation, such clause would mean that the relevant employees had to do something overt to opt out of the DCRB regulations; if they did nothing, they remained covered thereby. The duty to bring about a harmony in the interpretation of two apparently conflicting clauses in a document demands that clause 2A(a) of the DCRB regulations has to be read in the light of clause 5A thereof, particularly sub-clause (ii) in the later clause. Clause 5A(ii) stipulates that if the option is not exercised by an individual employee within a certain time

limit it will be deemed that he has not opted for coming under the DCRB regulations. The overt act that clause 2A(a) of the DCRB regulations apparently demands must be read in conjunction with the requirement under clause 5A(ii) thereof. Such a conjoint reading makes it obvious that a person who had not overtly opted under the regulations "will be deemed that he has not opted" for being governed by the DCRB regulations. If the deeming provision in clause 5A(ii) of the DCRB regulations is read into the expression "opted out" in regulation 2A(a) thereof, there would be no anomaly. That would be the only permissible way to read and interpret both clause 2A(a) and clause 5A(ii) of the DCRB regulations. It is only when the two clauses are read in such manner that there would be a degree of harmony and synchronicity and the apparent conflict would have dissolved.

44. Having dealt with the argument in theory, it must be noticed that none of the petitioners even remotely perceived that by virtue of clause 2A(a) of the DCRB regulations they stood covered thereby and were not required to exercise any option. Since the proof of the pudding is in the eating, it may also be noticed that all the petitioners obtained their provident fund contribution and the lump sum amounts at the time of their retirement with full consciousness that they had not opted for the DCRB regulations. In a sense, the argument as to the perceived conflict between clause 2A(a) and clause 5A(ii) was not available to the petitioners by virtue of their admitted conduct.

45. The ground of discrimination urged by the petitioners, in the sense that certain benefits are perceived to have been conferred on those governed by the pension scheme to the exclusion of the other retirees, attractive as it may seem, is of no legal consequence. To appreciate the argument, the mechanics of the two schemes have to be seen. Notwithstanding EPS 1995, which replaced the CPF scheme, providing for nominal monthly pension, the essence of both CPF and EPS 1995 was that the entire contribution of the employee and the matching contribution of the employer would be wholly, or substantially, made over to the retirees covered by such schemes at or immediately upon retirement. On the other hand, such money, including the contribution made by the retiring employees covered by the pension scheme, would be retained by the employer to be released on a monthly basis whether to the retiree or, upon his death, to his family. While there was an element of certainty about the lump sum amount that a retiree covered by CPF or EPS 1995 would receive at the time of retirement, the ultimate pay-out to the retirees or the families of the retirees covered by the pension scheme would be governed by several uncertainties like the life-span of a retiree or that of the members of the family entitled to receive pension after him.

46. It was possible for a retiree under the CPF or EPS 1995 schemes to invest the lump sum amount wherever he chose. It is possible that one retiree under such schemes invested in a company that later sunk; while another invested in gold, the prices whereof sky-rocketed over time. Just as it would not be possible

for the retiree whose investment was lost to complain of the other retiree whose investment prospered, retirees covered by the CPF and EPS 1995 schemes, as a class, cannot be heard to complain of the monies received or receivable by those covered under the pension scheme after their retirement. On the side of the pension scheme, just as it was possible for a retiree to survive 30 or 40 years after retirement and the family pension to continue for several years thereafter, it was equally possible that the retiree or other members of the family entitled to the family pension died within a short time after retirement. Thus, it depended on the quantum of the fund available under pension scheme for the managers thereof to decide on varying the monthly payments or passing on the returns on the investments to the retirees since the fund belonged to the pension scheme retirees as a class.

47. In view of the different paths consciously chosen by the retirees covered by the CPF and the EPS 1995 schemes, they could no longer compare themselves with the retirees covered by the pension scheme. It would be a case of apples and oranges.

48. Since it appears that these petitioners may all have been aware of the circular of December 14, 2001 and consciously chose not to switch over to the pension scheme despite the opportunity afforded by such circular and the other grounds urged are found to be of no merit, the order impugned cannot be faulted and there can be no cheer for the petitioners in the matter which has been directly heard along with the three appeals.

49. FMA 34 of 2019, FMA 35 of 2019 and FMA 36 of 2019 fail. WP 9603(W) of 2016 is dismissed.

50. There will, however, be no order as to costs.

51. Certified website copies of this judgment, if applied for, be urgently made available to the parties upon compliance with the requisite formalities.